

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





76 2104

To be argued by:  
RICHARD M. ZUCKERMAN

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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BILL LAM, a/k/a LAM MAN CHUNG,  
Petitioner-Appellant  
-against-  
UNITED STATES OF AMERICA,  
Respondent-Appellee.

On Appeal from the United States District Court  
for the Southern District of New York

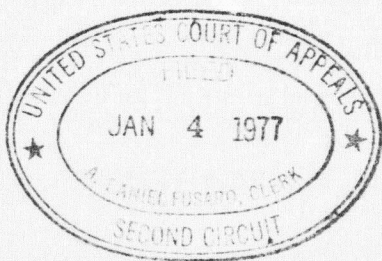
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REPLY BRIEF OF PETITIONER-APPELLANT

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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BILL LAM, a/k/a LAM MAN CHUNG, :  
Petitioner-Appellant, : Docket No. 76-2104  
-against- :  
UNITED STATES OF AMERICA, :  
Respondent-Appellee. :

- - - - -x

REPLY BRIEF OF PETITIONER-APPELLANT

Preliminary Statement

The Government presents two arguments in support of the District Court's decision denying petitioner-appellant Lam's motion to vacate his guilty plea and sentence.

First, the Government argues that the District Court's conclusion that Gerber was not motivated by a desire to aid Szeto, when he advised Lam to plead guilty, should not be disturbed unless clearly erroneous. (Govt. Br. 15)\*

Second, while apparently conceding that Gerber had a "generalized understanding" that the United States Attorney and the Court would not accept a guilty plea from one co-defendant if another co-defendant went to trial, the Government

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\* References to (Govt. Br. ) are to the Brief of the United States of America on this appeal. References to (Lam Br. ) are to the main brief of petitioner-appellant Lam on this appeal.

argues that that understanding did not produce a conflict of interest. It bases this argument on an assertion that Gerber did not operate with that understanding in this case. (Govt. Br. 17-21).

The first of these arguments is erroneous, as a matter of law; the second relies upon an inaccurate reading of the record.



ARGUMENT

I.

THE DISTRICT COURT'S CONCLUSION THAT GERBER'S ADVICE TO LAM WAS NOT TAINTED BY A CONFLICT OF INTEREST RESULTED FROM THE APPLICATION OF AN IMPROPER LEGAL STANDARD.

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Although the District Court did state that Gerber was not motivated by a desire to aid Szeto when he advised Lam to plead guilty (A-10), that conclusion resulted from the application of an improper legal standard.

Rather than determining if the facts of the criminal case produced a conflict of interest, the Court below focussed on whether there were reasons upon which competent counsel might have advised Lam to plead guilty (A-9). Concluding that there were such reasons, the District Court stated that it was "more logical" that Lam pled guilty because of the strength of the Government's case, rather than because of a desire, of Gerber or Lam, to aid Szeto (A-10).

The District Court's opinion is thus, in effect, a conclusion that because there were valid reasons for Lam to plead guilty, Lam was not denied effective assistance of counsel, whether or not there was a conflict of interest. As was pointed out in petitioner's main brief, that legal approach is improper (Lam Br. 18).



To determine whether advice rendered by counsel representing co-defendants was tainted by a conflict-of-interest, the District Court must determine whether the lawyer would have been free to give the contrary advice, without fear that rendering that advice would be detrimental to his other client.

Applied to this case, the question which the District Court should have answered was whether -- at the time Gerber advised Lam to plead guilty -- Gerber would have been able to advise Lam to plead not guilty, without fear that that advice, rendered to Lam, would have been damaging to Szeto.

Gerber testified that before concluding whether it was in Lam's interests to plead guilty or go to trial, he determined that it was in Szeto's best interests to plead guilty. (H. Tr. 12, 69, 72). Gerber also testified that he understood that the United States Attorney would not accept a guilty plea from Szeto unless Lam also pled guilty. (H. Tr. 90-93).

Thus, at the time that Gerber advised Lam to plead guilty, Gerber believed that if he advised Lam to plead not guilty, it would hurt Szeto because the Court would not accept Szeto's guilty plea.



That establishes a conflict of interest. The fact that Lam pled guilty in reliance upon Gerber's advice establishes that Lam was prejudiced by the conflict, and was denied effective assistance of counsel.

The legal standard applied by the District Court would eviscerate the right to counsel whenever the Government had a "strong" case, because it would always appear "logical" that a defendant pled guilty because of the strength of the Government's case,\* and not because of a conflict. This Court has explicitly rejected that approach:

"We cannot accept the proposition that the more potent the Government's case, the less compelling the criminal defendant's constitutional right to independent counsel."

United States v. Carrigan, Docket Nos. 74-2056, 74-2057 (2d Cir., Nov. 3, 1976, slip opinion at 396-397).

Because the District Court's conclusion that Gerber's advice to Lam was not tainted by a conflict resulted from the

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\* The Government's brief endlessly discusses the strength of its criminal case against Lam. Because that discussion is irrelevant to the issue before this Court -- whether Gerber was burdened by a conflict of interest -- it does not warrant a detailed response. However, it may be noted that there was only one piece of direct evidence against Lam -- narcotics agents would have testified that they saw Lam throw some drugs to the floor. (P. Tr. 23).



application of an improper legal standard, it should be set aside by this Court.\*

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\* The Government repeatedly asserts that findings of the District Court may not be set aside unless "clearly erroneous." (Govt. Br. 15 n.\*, 16-17). However, findings which result from the application of an improper legal standard are not protected by the "clearly erroneous" rule. United States v. Zelker, 466 F.2d 1092, 1098 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973). Rather, once this Court concludes that the District Court applied an improper legal standard, it must reexamine the findings that flowed from the application of that standard to determine whether the same findings would have been reached if the appropriate standard had been applied. It is respectfully submitted that had the District Court applied the appropriate legal standard, it would have had to conclude that there was a conflict of interest which denied Lam effective assistance of counsel.



## II.

GERBER'S REPRESENTATION OF LAM WAS  
AFFECTED BY HIS UNDERSTANDING THAT  
SZETO COULD NOT PLEAD GUILTY UNLESS  
LAM ALSO PLED GUILTY.

The Government seeks to discount Gerber's understanding of the practice of the United States Attorney in multidefendant cases by arguing that Gerber denied that he had operated with that understanding in this case. Thus, the Government characterizes as a "gross distortion" of the record (Govt. Br. 17 n.\*; 20) the statement in petitioner's main brief that

"According to Gerber's view, his advice to Lam to plead guilty was part of a 'package plea bargain,' under which Szeto was allowed to plead guilty only because Lam -- in Gerber's words -- 'accepted the inevitability and advisability of pleading guilty.'" (H. Tr. 88)

Respectfully, that statement is an entirely accurate description of Gerber's testimony.

While Gerber did not use the words "package plea bargain," he unequivocally testified that he believe that the United States Attorney would not allow Szeto to plead guilty if Lam went to trial. (H. Tr. 90). Thus, Gerber stated on cross-examination:



Q So it was your opinion that the Court would not and the U.S. Attorney would not allow Mr. Szeto to plead guilty if Mr. Lum [sic] was going to go to trial?

A At that time and before I received the 3500 material, and it's because of that feeling that I received the 3500 material that was my opinion coming out of many years of practice.

(H. Tr. 90; emphasis added).\*

Gerber thus applied his understanding to this case, and was therefore burdened by a conflict of interest which denied Lam effective assistance of counsel.

#### CONCLUSION

For the foregoing reasons, and for the reasons set forth in petitioner-appellant Lam's main brief, the judgment of the District Court should be reversed.

Dated: New York, New York  
January 4, 1977

Respectfully submitted,

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\* Because this testimony has been read so differently by opposing counsel, and because this appeal is being prosecuted on the original record, the relevant pages of the transcript containing this testimony (H. Tr. 88-93) are annexed hereto as an appendix, for the convenience of the Court.



A P P E N D I X



1 understanding between them and myself and the United States  
2 Attorney before we got to Court on May 31st.  
3

4 Q Did Mr. Lam ever say to you up until May 31st  
5 that he wanted to plead guilty?

6 A Yes, he did, or he accepted inevitability and  
7 advisability of pleading guilty. I don't know how to put  
8 that, but that's it.

9 Q On the morning of May 31st, you testified on  
10 direct examination that Mr. Szeto attempted to plead guilty  
11 and the Judge declined to accept the plea?

12 A He did not attempt. He pleaded guilty, but he  
13 did not give the Judge a satisfactory answer on the selling  
14 aspect, and the Judge himself then denied the application  
15 to accept his plea.

16 Q And you just said a moment ago that Mr. Lam  
17 intended to plead guilty?

18 A Mr. who?

19 Q That Mr. Lam, the petitioner.

20 A Please call him -- all right, Lam, go ahead.

21 Q I can refer to him as Bill Lum, if it's easier  
22 for you.

23 A Yes, that Mr. Lam did what?

24 Q You just testified a moment ago that Bill Lum  
25 intended to plead guilty before you went to Court on May 31?



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Gerber-cross

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A Yes, that was by prior arrangement amongst ourselves after our discussions.

Q After the Court refused to accept Mr. Szeto's plea, did you attempt to plead Mr. Lum guilty at that time?

A Bill Lum came on for pleading after lunch and pleaded as the record will show.

Q I want to focus on the morning, first. Before the jury was impanelled, I believe the record will show that the first thing that happened in the morning was that Mr. Szeto attempted to plead guilty and the Judge declined to accept the plea.

A I have explained that and that is so.

Q After that, you just said that Mr. Lum also wanted to plead guilty. After that -- I am sorry --

A Yes, go ahead.

Q You just said that Mr. Lum also wanted to plead guilty. After the Judge refused to accept Mr. Szeto's plea, did you attempt to enter a plea of guilty for Mr. Lum?

A Not until that afternoon after lunch, after I had received and showed them the 3500 material.

Q And before you entered a plea of guilty for Mr. Lum, the Government had opened and presented its case to the jury after the jury had been impanelled; is that correct?



1                   A       The United States Attorney made an overall  
2                   statement as to what he was going to show to the jury, and  
3                   with his peroration, he called for a conviction. That  
4                   was before we went out to lunch.

5                   Q       Is the reason that before the United States  
6                   Attorney opened to the jury that you did not attempt to  
7                   enter a plea of guilty for Mr. Lum is that it was your  
8                   understanding that the U.S. Attorney would not allow one  
9                   defendant to plead guilty and the other defendant was go-  
10                  ing to trial?

11                 A       My experience over many years was where there  
12                 were multiple defendants, unless one of them would turn,  
13                 what should I say, State's evidence, if all that were in-  
14                 volved wouldn't plead, the prosecutor -- and that was both  
15                 State and Federal -- would not accept a plea of any of them,  
16                 unless he had an informant he would not take it.

17                 Q       So it was your opinion that the Court would not  
18                 and the U.S. Attorney would not allow Mr. Szeto to plead  
19                 guilty if Mr. Lum was going to go to trial?

20                 A       At that time and before I received the  
21                 3500 material, and it's because of that feeling that I  
22                 received the 3500 material, that was my opinion coming  
23                 out of many years of practice.

24                 Q       Let me ask you further on that. If in the  
25



1 morning, if after Mr. Szeto had pleaded guilty, if the  
2 Court had accepted Mr. Szeto's plea --

3  
4 A If the Court had done what please?

5 Q You testified before and the record will show  
6 that the Court declined to accept Mr. Szeto's plea. If  
7 the Court had accepted Mr. Szeto's plea in the morning,  
8 would you have then had attempted to enter a plea of  
9 guilty for Mr. Lum?

10 A In the ordinary course of the arrangement for  
11 that morning, the Judge would have called on Mr. Lum for  
12 the catechism to decide in his mind, the Court's mind,  
13 whether or not to accept the plea; and the Court did not  
14 leave us at that time with one hanging. The Court left us  
15 at that time with no man with a plea before the Court that  
16 the Court would accept.

17 Q By that you mean that because the Court refused  
18 to accept Mr. Szeto's plea, the Court would not let Mr. Lum  
19 change his plea to guilty; is that correct?

20 A The Court did not call on Mr. Lum to find out  
21 whether he was going to plead guilty or not.

22 Q And if Mr. Szeto had pleaded guilty and if the  
23 Court had accepted the plea, then the Court would have --  
24 it was your understanding that the Court would have called  
25 on Mr. Lum and asked him whether he wanted to plead guilty?



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A My experience is that that's how it would happen before the Court made his determination on the application of the first pleader.

Q If the Court had accepted Mr. Szeto's plea in the morning, and then Mr. Lum started to plead, and if the Court accepted Mr. Lum's plea, it's your understanding that both defendants would then have -- the Court would then have accepted guilty pleas for both defendants?

A Of course I can't read the tablet in the Court's mind, but that would be the general practice.

Q That was your understanding of the position of the U.S. Attorney and the position of the Court?

A That's right, because the U.S. Attorney would have had his two confessions, so to speak; the Judge would be satisfied upon his catechism and interpretation that the pleas were voluntary and correct; and that would have disposed of it except for a sentencing date.

Q Here I am asking for your understanding again of what the practice was of the U.S. Attorney and the practice of the Court. If Mr. Szeto had pleaded guilty in the morning and if the Court accepted Mr. Szeto's plea, then the Court called upon Mr. Lum to plead guilty, and the Court refused to accept Mr. Lum's plea of guilty, the Court said to Mr. Lum that he would have to go to trial, at that



point would Mr. Lum have gone to trial alone or would both he and Mr. Szeto have had to go to trial together?

A I can't anticipate what the Court would have done. I can tell you what I imagine.

Q Did you imagine --

THE COURT: Let's not imagine.

A No.

Q What was your --

THE COURT: Let's not imagine.

A I don't know. The Court did not --

THE COURT: We are flying in the realm of speculation, imagination. Let's get down to brass tacks; should we?

THE WITNESS: I can't give the answer to that until I speculate.

THE COURT: Don't speculate.

THE WITNESS: I don't want to speculate.

MR. ZUCKERMAN: Your Honor, may I ask the witness what his understanding was of the practice of the Court which I believe has direct relevance to the judgement that he used in and the advice he gave.

THE COURT: I think we have had the answers already. And I certainly --

MR. ZUCKERMAN: I had intended that this was

